84-610

Office Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

M/V TORVANGER
and
WESTFAL LARSEN & CO., A/S,
Petitioners

v.

THE QUAKER OATS COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Under 46 U.S. Code § 1304(2)(m) which excepts an ocean carrier from liability due to the inherent vice of a cargo, must the ocean carrier prove the specific cause of the cargo damage, or may the carrier establish the probability of inherent vice, thus shifting the burden to the shipper of disproving the exception.

2. In reversing the district court, did the Court of Appeals for the Fifth Circuit err in holding that the ocean carrier must bear the burden of proof under the 46 U.S. Code § 1304(2)(m) inherent vice exception to the ocean carrier's liability.

CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following list of parties have an interest in the outcome of this case.

1. Respondent, The Quaker Oats Company;
2. Tokio Marine & Fire Insurance Company, Ltd.;
3. Petitioner, Westfal Larsen & Co., A/S; and
4. Assuranceforeningen Skuld (Gjensidig) Oslo.

ROBERT M. JULIAN
Attorney of Record for Petitioners
Westfal Larsen & Co., A/S

TABLE OF CONTENTS

	Page
Questions Presented for Review	I
Certificate of Interested Persons	II
Table of Contents	III
Table of Authorities	IV
Opinions Below	V
Jurisdiction	V
Statement of the Case	1
Argument	4
Conclusion	9
Certificate of Service	10
Appendix	1a

TABLE OF AUTHORITIES

CASES

	Page
American Tobacco Company v. Goulandris, 281 F.2d 179 (2nd Cir. 1960)	6
American Tobacco Company v. The Hadjipatera, 81 F.Supp. 438 (S.D.N.Y. 1948), mod. on other grounds, 194 F.2d 449 (2nd Cir. 1951)	6
Hecht, Lewis and Kahn, Inc. v. The S.S. PRESIDENT BUCHANAN, 236 F.2d 627 (2nd Cir. 1956)	6
The Neil Maersk, 91 F.2d 932 (2nd Cir. 1937), cert. denied, 302 U.S. 753 (1937)	6, 7
Schnell v. The Vallescura, 293 U.S. 296, 79 L.Ed. 373 (1934)	4, 5, 6, 7, 8
Shin Fa Oil Mill Co., Ltd. v. M/S NORMA, 1976 A.M.C. 936 (1976)	8
United States v. Central Gulf S.S. Corp., 340 F.Supp. 473 (E.D. La. 1972), aff'd per curiam, 456 F.2d 1281 (5th Cir. 1972), vacated on other grounds, 517 F.2d 687 (5th Cir. 1975)	7, 8
U.S. Steel International, Inc. v. M/V GRANHEIM, 540 F.Supp. 1326 (S.D.N.Y. 1982)	6, 7, 8

STATUTES

Carriage of Goods by Sea Act, 46 U.S. Code § 1304(2)(m), (q)	I, V, 4, 6, 7, 8, 9
28 U.S. Code § 1254(1)	V

UNITED STATES CONSTITUTION

Article III, Section 2	3

OPINIONS BELOW

The opinion of the Court of Appeals is included in the Appendix. The opinion of the United States District Court for the Southern District of Texas is included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1984. The Defendant's Petition for Rehearing and Suggestion for En Banc Consideration were denied on July 13, 1984, and this petition for certiorari was filed within 90 days of the date. The jurisdiction of this Court is invoked under 28 U.S. Code § 1254(1).

STATUTE

This case involves the interpretation of 46 U.S. Code, Section 1304(2)(m). The complete provisions of this statute are set forth in the supplement.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

The Quaker Oats Company purchased approximately five hundred metric tons of tetrahydrofuran from Mitsubishi Corporation of Tokyo, Japan. Mitsubishi arranged for the shipment of the cargo to Quaker Oats by chartering the M/V TORVANGER to carry the cargo from Kobe, Japan to Houston, Texas. The cargo was shifted from a shore tank in Kobe, part of the cargo being transferred to tank cars and part to a small tanker. The cargo

was then taken to the TORVANGER at anchorage in Kobe Harbor and loaded onboard the vessel. The trip from Kobe to Houston was the TORVANGER's maiden voyage. The ship's tanks had never before been used by any cargo which might affect the tetrahydrofuran and furth r, the tanks were inspected, approved as proper for transportation of tetrahydrofuran by the shipper prior to loading of the cargo. Tetrahydrofuran naturally forms peroxides; in this instance peroxide formation was supposedly inhibited by the shipper by the addition of butylated hydroxytoluene. In addition, while the cargo was carried on the M/V TORVANGER a nitrogen "blanket" was maintained over the tetrahydrofuran to further inhibit peroxide formation. The ship's records show that this nitrogen "blanket" was fully maintained throughout the voyage.

Quaker Oats' purchase order specified a maximum peroxide content of 150 parts per million (ppm) in the tetrahydrofuran. Samples were taken of the cargo from the tanks of the M/V TORVANGER in Kobe, Japan, and they revealed an acceptable peroxide level of 10 ppm. Samples were taken from the TORVANGER's tanks in Houston prior to discharge, and they revealed peroxide levels in two of the ship's tanks within acceptable limits of 62 ppm and 142 ppm, the third tank sample reading 742 ppm. After the vessel arrived in Houston, the cargo was transferred to railcars which transported it to Memphis, Tennessee, where the peroxide contamination was discovered.

In transferring the cargo from the ship to rail tank cars in Houston according to the shipper's instructions, the cargo from the various tanks was not kept segregated, but rather the quantities of acceptable and unacceptable

tetrahydrofuran were combined thereby adversely affecting the entire shipment.

On January 3, 1978, The Quaker Oats Company, filed its Complaint against the M/T TORVANGER and its owner and operator, Westfal Larsen & Co., A/S, seeking to recover damages for contamination of Quaker Oats' cargo of tetrahydrofuran which was transported in bulk from Kobe, Japan to Houston, Texas on the M/V TORVANGER. The court of first instance heard this case based upon its admiralty and maritime jurisdiction, Article III, Section 2 of the Constitution of the United States.

Answer was filed by Westfal Larsen & Co., A/S on February 16, 1978, and the case was tried before the Honorable James DeAnda without a jury on June 23, 1980. On May 12, 1983, the Trial Court filed its Memorandum Opinion dated April 25, 1983 entering Final Judgment for Westfal Larsen & Co., A/S and taxing costs against Quaker Oats. Quaker Oats filed its Notice of Appeal on May 24, 1983, appealing from the final Judgment filed on May 12, 1983.

Briefs were filed by the parties, but no oral argument was conducted. The case was decided on June 15, 1984 by a panel consisting of Circuit Judges Brown, Tate and Higginbotham. Judge Tate wrote the opinion, a copy of which is included herein as the Appendix. In reversing the lower court the opinion held that none of the specific excepting causes in 46 U.S.C. § 1304(2)(a)-(p), were proved by the carrier, and so the burden of proof never shifted back to shipper to prove that the carrier's negligence contributed to the damage. In support of this opinion the panel found that the carrier's

proof was inadequate to establish the excepted cause of inherent vice, 46 U.S.C. § 1304(2)(m), because the carrier did not show some defect, quality, or vice adhering to the individual cargo of the chemical in question. In regard to the catch-all exception to liability 46 U.S.C. § 1304(2)(q) the opinion stated that the carrier must prove what the cause of the cargo damage was. The burden of proof required of the carrier under 46 U.S.C. § 1304 (2)(m)(q) was inaccurately described in the opinion and case law of the Fifth Circuit was mistakenly applied.

Westfal Larsen & Co., A/S submitted a Petition for Rehearing and Suggestion for En Banc Consideration to the Court of Appeals for the Fifth Circuit. Both the Petition and Suggestion were denied without opinions.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals for the Fifth Circuit is in direct conflict with decisions of this Court and decisions of the Second and Fifth Circuits, and is also in conflict with well settled cases as applied and followed in the courts of this country.

In 1934 Mr. Justice Stone of this Court wrote the opinion of *Schnell v. The Vallescura,* 293 U.S. 296 (1934). In that case the carrier was held liable for the decay of a cargo of Spanish onions. The evidence indicated that the damage was the result of poor ventilation caused by the closure of hatches for long periods, some time necessitated by bad weather and some time during

fair weather. Although the case dealt with exceptions to liability under the Harter Act, the precedential value of the opinion applies equally as well to COGSA cases such as the instant case. In regard to the exception for inherent vice of the cargo the court stated: "To such exceptions of law itself annexes a condition that they shall relieve the carrier from liability for loss from an excepted cause only if in the course of the voyage he has used due care to guard against it." 293 U.S. at 304.

Both the District Court and the Court of Appeals agreed that the carrier, Westfal Larsen, exercised due diligence in the care of the cargo, or at least that evidence of such due care was not contradicted. In light of the quote above from *Schnell v. The Vallescura,* 293 U.S. at 304 it is apparent that by proving that the cargo was handled with due care while in its legal and physical possession, Westfal Larsen has established that the cargo contamination was a result of the excepted cause of inherent vice. Mr. Justice Stone's opinion went on to state:

> It is commonly said that when the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it. Such we may assume the rule to be, at least to the extent of requiring the shipper to give evidence of negligence where the carrier has sustained the burden of showing that the immediate cause of the loss or injury is an excepted peril.

293 U.S. at 305.

In this particular case the plaintiff never introduced evidence of negligence on the part of Westfal Larsen in

caring for the cargo. It would appear that, according to the opinion of Mr. Justice Stone in *Schnell v. The Vallescura,* Westfal Larsen has sufficiently established the exception to liability under 46 U.S. Code § 1304(2)(m), and that the shipper has not presented evidence to disprove the "inherent vice" argument.

The Fifth Circuit reversal of the District Court in this case is contrary not only to *Schnell v. The Vallescura,* but is also contrary to opinions of the Second and Fifth Circuits. Recently, in *U.S. Steel v. M.T. Granheim,* 540 F.Supp. 1326 (S.D.N.Y. 1982), the court stated that:

> The older case law in this Circuit, however, has placed the burden of disproving inherent vice upon shipper. See *American Tobacco Company v. Goulandris,* 281 F.2d 179, 182 (2nd Cir. 1960); *Hecht, Lewis & Kahn Inc. v. The S.S. President Buchanan,* 236 F.2d 627, 631 (2nd Cir. 1956), *American Tobacco Company v. The Katingo Hadjipatera,* 81 F.Supp. 438, 466 (S.D.N.Y. 1948), modified on other grounds, 194 F.2d 449 (2nd Cir. 1951). In view of the clear holdings of these older Second Circuit cases which have never been overruled, this Court is bound to apply the burden of proof as stated therein.

540 F.Supp. at 1333.

Citing the holdings of *Schnell v. The Vallescura,* supra, and *The Neil Maersk,* 91 F.2d 932 (2nd Cir. 1937), cert. denied, 302 U.S. 753 (1937) the court in *American Tobacco Company v. The Katingo Hadjipatera,* stated:

> This would suggest that whenever cargo damage could have been caused by internal defects, the

> shipper must disprove such defects in order to recover even if the carrier's failure to exercise due diligence in stowing or caring for the cargo may have caused or contributed to the damage; *The Neil Maersk, supra.*

81 F.Supp. at 446.

The Court of Appeals for the Second Circuit requires the shipper to disprove the issue of inherent vice once established by the carrier. The degree to which a carrier must establish inherent vice appears to be a relatively low evidentiary standard. The introduction of uncontradicted and credible evidence of a cargo's propensity toward inherent decay is sufficient to establish the exception of inherent vice under 46 U.S. Code § 1304(2)(m). *U.S. Steel v. M.T. Granheim,* 540 F.Supp. 1326 (S.D.N.Y. 1982).

The appellate decision in *Quaker Oats Company v. M/V TORVANGER* is also in conflict with precedent from the very same Court of Appeals for the Fifth Circuit. In regard to the burden of proof under 46 U.S. Code § 1304(2)(m) the Court stated in *U.S.A. v. Central Gulf S.S. Corp.,* 340 F.Supp. 473 (E.D. La. 1972), aff'd per curiam, 456 F.2d 1281 (5th Cir. 1972), vacated on other grounds, 517 F.2d 687 (5th Cir. 1975): "If the carrier offers evidence which demonstrates the probability that damage was caused by an inherent defect, then it is incumbent upon the shipper to prove that the carrier was negligent before the carrier can be held liable." *U.S.A. v. Central Gulf S.S. Corp.,* 340 F.Supp. at 481.

Like the Court of Appeals for the Second Circuit, the decisions from the Fifth Circuit also rely on *Schnell v. The Vallescura,* 293 U.S. 296, 303 (1934) to interpret

the burden of proof requirements under 46 U.S. Code § 1304(2)(m). Applying *Schnell v. The Vallescura,* supra, to a fact situation similar to the instant case, the Fifth Circuit stated:

> We interpret the dictum from *Schnell and Folmina* to mean that if a carrier offers evidence which demonstrates the probability that damage was caused by an inherent defect, then it is incumbent upon the shipper to prove that the carrier was negligent before the carrier can be held liable.

340 F.Supp. at 481.

The Court of Appeals for the Fifth Circuit places the burden on the shipper to disprove the exception of inherent vice once it has been established by the shipper. The weight of authority in the Fifth Circuit, like that in the Second Circuit, indicates that to establish the exception of inherent vice, the evidence need not be dispositive but rather the evidence need only establish the probability of inherent vice. *U.S. v. Central Gulf S.S. Corp.,* 340 F.Supp. at 481; *United States Steel International Inc. v. M/T GRANHEIM,* 540 F.Supp. at 1332; *Shin Fa Oil Mill Co., Ltd. v. M/S NORMA,* 1976 A.M.C. 936, 939 (S.D.N.Y. 1976).

The reversal of the District Court by the Court of Appeals in this case was based primarily on the Court of Appeals' reasoning that: "None of the specific excepting causes (including the 'inherent defect' exception, . . .) 46 U.S.C. § 1304(2)(a)-(p) were proved by the carrier, so the burden did not shift back to the shipper to prove that carrier negligence contributed to the damage." *Quaker Oats Company v. M/V TORVANGER,* No. 83-2314, p. 4189 (1984).

As revealed by the precedent cited above from both the Second and Fifth Circuits the appellate opinion in this case is contrary to the case law of both circuits. The burden does not rest upon the carrier to prove the precise cause of the cargo damage, but rather to establish the probability of inherent vice. This the carrier has done.

THE ISSUE IS OF SUBSTANTIAL IMPORTANCE TO THE INTERNATIONAL SHIPPING INDUSTRY

Petitioner would not hazard a guess as to what percentage of annual international shipping involves the carriage of perishable or inherently defective cargo. However this percentage is indeed substantial.

The shipping community relies upon uniform legislation such as the Carriage of Goods by Sea Act for the orderly conduct of business.

This legislation provides the shipping community with a reasonable amount of certainty in regard to legal remedies and obligations involved in international commerce. Within the Court of Appeals for the Fifth Circuit, in regard to the carriage of perishable or inherently defective goods, there exists no such certainty.

CONCLUSION

It is submitted that the petitioner's interpretation of the burden of proof under 46 U.S. Code § 1304(2)(m) represents the meaning intended by the legislature and defined by the Courts of Appeals for the Second and Fifth Circuits. Historically the ocean carrier's burden has been to establish the probability of inherent vice, at which point the burden shifts to the cargo interests to disprove

the exception. The reliance of the international shipping community upon this burden of proof procedure is both established and sound. These questions are of vital importance to international shipping and the uniform admiralty law of the United States, therefore, petitioner respectfully prays that its petition for a Writ of Certiorari be granted.

Respectfully submitted,

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713/827-9990

Attorneys for Plaintiffs-Appellees

Of Counsel:

JULIAN & SEELE

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari was served upon opposing counsel Kenneth G. Engerrand, Brown, Sims & Ayre, 23rd Floor Post Oak Central, 2000 South Post Oak Blvd., Houston, Texas 77056-4496 on this the 11th day of October, 1984.

ROBERT M. JULIAN

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NUMBER H-78-05

THE QUAKER OATS COMPANY

v.

M/V TORVANGER, her engines, tackle, etc.,
and Westfal Larsen & Co., A/S

(Filed May 12, 1983)

Brown, Sims & Ayre (Kenneth G. Engerrand) of Houston, Texas for Plaintiff.

Robert M. Julian, of Houston, Texas for Defendant.

MEMORANDUM OPINION

The Plaintiff, the Quaker Oats Company, seeks recovery of damages resulting from contamination of one of its cargos which was carried by the Defendant M/T TORVANGER, owned and operated by the Defendant Westfal Larsen & Co., A/S. Pursuant to Rule 52, FED. R. CIV. P., the Court presents the following factual findings and legal conclusions which support judgment for the Defendant.

FINDINGS OF FACT

The Plaintiff purchased approximately five hundred metric tons of tetrahydrofuran from the Mitsubishi Cor-

poration of Tokyo, Japan. Mitsubishi chartered the "TORVANGER" to carry the chemical cargo from Kobe, Japan to Houston, Texas. The Plaintiff purchased the cargo C.I.F. Houston, and was the consignee and owner of the cargo pursuant to the bill of lading issued by the vessel's owner. (Plaintiff's Exhibit 1).

Section H, 1 of the voyage charter party provided that the "[o]wners undertake to clean vessel's tanks, pipes and pumps to Charterers' Inspector's satisfaction." (Plaintiff's Exhibit 2). Although the tanker was on her first voyage, a glycol cargo had been carried in the number 1 port deck tank. That tank and the two other stainless steel tanks that were to be used by Mitsubishi, numbers 1 and 2 starboard, along with their lines, pipes and pumps, were cleaned and inspected by the vessel's chief officer.

Mitsubishi retained the services of Nippon Kaiji Kentei Kyokai, Japan Marine Surveyors and Sworn Measurers' Association, to inspect the tanks and cargo. The tanks were approved and prepurged with nitrogen gas on March 13, 1976. About ninety percent of the cargo was transferred directly from its shore storage tank to the coastal tanker "SHINKAWA MARU" and the remainder was transferred from the tank to six tank trucks, which then delivered it to the "SHINKAWA MARU." The cargo was taken to the anchored "TORVANGER" and transferred from the "SHINKAWA MARU" through one line into the three "TORVANGER" tanks. Mitsubishi's inspector took cargo samples from the three tanks. These were combined and, when analyzed, found to contain ten parts per million peroxide. The Plaintiff's purchase order (Plaintiff's Exhibit 6) specified a maximum peroxide content of one hundred fifty parts per million. Tetrahydrofuran naturally forms peroxides, particularly when exposed to

oxygen. Peroxide formation is inhibited by the addition of butylated hydroxytoluene; this cargo had been so "inhibited" by Mitsubishi. In addition, a nitrogen "blanket" was injected in the tanks and maintained by the vessel's officer pursuant to Section H, 6 of the charter party.

The vessel reached the General American Transportation Corporation terminal at Galena Park, Texas on May 24, 1976, and was met by representatives of the Plaintiff and its inspection firm, Charles Martin, Inspectors of Petroleum, Inc. Under the charter agreement the Plaintiff had twelve hours within which to remove the cargo before demurrage of $400.00 per hour had to be paid. In addition, ten railroad tank cars were standing waiting for the cargo. The inspector examined the "TORVANGER" tanks and took samples of the cargo from each of them. The cargo samples were analyzed for water content which was determined to be at an acceptable level. Because the acceptable water content indicated that the cargo was sound generally and that the nitrogen blanket had been maintained properly, more detailed chemical analyses were not performed prior to the cargo's discharge. Tests for peroxide content would have taken between eight and ten hours and there was no reason for the Plaintiff's representatives or inspectors to suspect that the cargo did not meet their specifications in any way. With the Plaintiff's approval the vessel and dock crews began to unload the cargo through one line into the railcars which was the normal procedure.

The cargo was transported to the Plaintiff's plant in Memphis, Tennessee where it was discovered that eight of the ten railcars contained tetrahydrofuran with peroxides in excess of one hundred fifty parts per million. The samples taken from the "TORVANGER" tanks be-

fore discharge were then analyzed, and peroxide contents determined as follows: number 1 port, one hundred forty-two parts per million; number 1 starboard, sixty-two parts per million; and number 2 starboard, seven hundred forty-two parts per million. The number 1 tanks, both port and starboard, had been filled; the number 2 starboard tank had contained less than a fifth of the total cargo.

The cargo had an invoice value of $637,005.64. By that time eighty percent of it had peroxides in excess of the specifications; it could not be used by the Plaintiff and was not even marketable except to firms who would recondition it for resale by eliminating the peroxides. The Plaintiff instead performed the reconditioning process itself at a total cost of $39,421.00. This figure includes laboratory expense, labor, salvage expense and loss of product, all of which were reasonably and necessarily incurred by the Plaintiff in its successful effort to mitigate its damages.

CONCLUSIONS OF LAW

The Court has jurisdiction over the Defendant Westfal Larsen & Co., A/S and the subject matter of this action, which is governed by the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq.*

The Court concurs with the Plaintiff that the Defendant's obligation to the Plaintiff under COGSA is not limited by the charter party provision that the tanks, pipes and pumps be cleaned to Mitsubishi's inspector's satisfaction. *See Jamaica Nutrition Holdings v. United Shipping,* 643 F.2d 376, 379 (5th Cir. 1981). The fact that the Defendant cleaned the system to the satisfaction of Mitsubishi's inspector is relevant to resolution of the

COGSA claim, however. The Plaintiff made a *prima facie* case for cargo damage liability by producing evidence that the cargo was delivered to the vessel within the purchase order specifications and that at least a portion of it was no longer in that condition when tendered to the Plaintiff. The burden thereby shifted to the Defendant to show that this cargo damage falls within one of the COGSA exceptions set forth in 46 U.S.C. § 1304(2). The Defendant produced evidence that peroxide formation is an "inherent vice" of tetrahydrofuran, 46 U.S.C. § 1304(2)(m), and that the Defendant exercised due diligence to avoid any other possible causes of peroxide formation for which it would be responsible, 46 U.S.C. § 1304(2)(q).

It is undisputed that tetrahydrofuran tends to form peroxides. The Plaintiff argues, however, that because the inhibitor was added the cargo was no longer inherently susceptible to peroxide formation. Surely the presence of the inhibitor affects the weight of the "inherent vice" evidence and would preclude, for example, shifting the burden back to the Plaintiff on that evidence alone. However, the presence of the inhibitor does not completely negate the fact that the damage suffered is an inherent vice of this cargo. This tetrahydrofuran did form peroxides despite the addition of the inhibitor, and the question is whether or not it was caused to do so at least in part by the Defendant's negligence. Because no one knows what caused the cargo to form peroxides in the way it did, the COGSA burden-shifting mechanism determines the outcome of this case. The Defendant cannot be expected to show that the inhibitor did not work properly; that evidence is not within its realm. Rather, to carry its burden the Defendant augmented the non-dispositive

evidence of inherent vice/inhibitor with evidence negating other arguable causes.

The Plaintiff suggests that the cause of the peroxide formation most likely was a contaminant in the "TORVANGER" tank and/or lines. The Defendant produced evidence that it exercised due diligence to prevent any contamination of the cargo. Due diligence requires that the ship owner take normal precautions to ensure that his ship is seaworthy, and "is essentially the same as exercising reasonable or ordinary care." *Yawata Iron & Co., Ltd. v. Anthony Ship Co., Ltd.*, 396 F. Supp. 619, 627, n.10 (S.D.N.Y. 1975), *citing Peter Paul, Inc. v. Rederi A/B Pulp*, 258 F.2d 901 (2d Cir. 1958). The Defendant cleaned the system to the satisfaction of Mitsubishi's inspector. Although that approval does not define the Plaintiff's rights under COGSA, as was noted above, it does indicate that due care was exercised in preventing contamination. The expertise of Mitsubishi's inspection firm was not challenged and, in fact, was relied upon by the Plaintiff for its evidence of the cargo's condition upon delivery to the Defendant.

The Defendant also produced evidence that it exercised due diligence in maintaining the cargo's nitrogen blanket—that it was checked periodically and kept at an appropriate level. The Plaintiff's evidence further supports the conclusion that the peroxide formation was not caused by failure to maintain the nitrogen blanket. The water content analysis performed upon arrival in Texas indicated to the Plaintiff's experts that the blanket had been maintained properly. Another of the Plaintiff's experts testified that a nitrogen blanket is not needed to prevent peroxide formation when tetrahydrofuran is properly inhibited, which means that properly inhibited tetra-

hydorfuran would not have been caused to develop peroxides solely by some failure of the nitrogen blanket.

The Court concludes that the Defendant's demonstration that it exercised due diligence with respect to the preparation of the loading and storage equipment, the loading of the cargo, and the care of the cargo during the voyage, was sufficient to return to the Plaintiff the burden to show that the peroxide formation was caused at least in part by the Defendant's negligence. *Nitram, supra* at 1373. The Plaintiff failed to carry this burden.

The Plaintiff had access to the damaged cargo and more ability than anyone else to explore the cause or causes of the peroxide formation. One of the Plaintiff's experts in Memphis identified traces of a "wet high boiling liquid subject to air oxidation," the chemical composition of which was not identified. Knowing the "TORVANGER" had carried a prior cargo of di-Butyl-glycol-ether, the expert hypothesized that the foreign substance appearing in the bad cargo sample was in fact the prior cargo and that it could have caused the peroxide formation. The prior glycol cargo, however, had been carried in the number 1 port tank and not in the number 2 starboard tank where peroxides formed so dramatically. Although contamination from the prior cargo could have come from the line which apparently was used for both, the cargo also could have been contaminated in one or more of the six trucks and/or the coastal tanker used between the storage tank and the "TORVANGER." The fact that peroxides had not yet begun to form when the initial "TORVANGER" samples were taken does not negate the possibility that whatever "over-rode" the inhibitor was already in the cago at that time. On the other hand, there is evidence negating the likelihood of contam-

nation from the "TORVANGER" line—that it was cleaned and purged.

The Plaintiff's chemists originally indicated that they would do further tests to identify the origin of the peroxides, but no such evidence was presented. Because the cargo all came from the same coastal tanker, the distinguishing feature of the number 2 starboard tank was that it was only partially full. The Plaintiff did not present evidence on the effect, if any, that had on the cargo. Nor did the Plaintiff present evidence on possible causes or conclusions to be drawn from the diminished concentration of inhibitor in the damaged cargo.

The answer to this mystery lay in the damaged cargo. The Plaintiff had access to it and could not determine what caused the peroxides to form. The Defendant certainly was not able to absolve itself by demonstrating the origin of the peroxides. It did, however, present evidence that it exercised due care in every way it dealt with the cargo, and the Plaintiff had no evidence to the contrary other than the damage itself. The Plaintiff did not carry its burden under COGSA, and all requested relief is DENIED.

The Clerk shall send a copy of this Memorandum Opinion to counsel for the parties.

DONE this 25th day of April, 1983.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NUMBER H-78-05

THE QUAKER OATS COMPANY

v.

M/V TORVANGER, her engines, tackle, etc., and Westfal Larsen & Co., A/S

(Filed May 12, 1983)

FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion in this action, Final Judgment hereby is entered for the Defendant. All taxable costs are assessed against the Plaintiff.

This is a Final Judgment.

The Clerk shall send a copy of this Final Judgment to counsel for the parties.

DONE this 25th day of April, 1983.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX C

The QUAKER OATS COMPANY,
Plaintiff-Appellant,

v.

M/V TORVANGER, her engines, tackle, etc.,
and Westfal Larsen and Co., A/S,
Defendants-Appellees.

No. 83-2314

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 15, 1984.

Shipper brought action against carrier for damage to cargo under the Carriage of Goods by Sea Act. The United States District Court for the Southern District of Texas, James DeAnda, J., dismissed the claim, and shipper appealed. The Court of Appeals, Tate, Circuit Judge, held that carrier's proof of due diligence in preparation of cargo, its loading, and its care during voyage was not sufficient to rebut shipper's prima facie case of liability for damaged cargo under the Act, absent proof of what "other cause" of the damage was, under catchall no-fault statutory exception to liability.

Reversed and remanded.

Appeal from the United States Court for the Southern District of Texas.

Before BROWN, TATE, and HIGGINBOTHAM, Circuit Judges.

TATE, Circuit Judge:

The plaintiff, The Quaker Oats Company ("Quaker Oats"), appeals from the district court's dismissal of its claim under the Carriage of Goods by the Sea Act ("COGSA"), 46 U.S.C. § 1300-1315, for damages to a cargo of tetrahydrofuran, a white chemical, shipped aboard the M/V Torvanger, a vessel owned by Westfal Larsen and Company ("Westfal Larsen"), made defendants herein. Quaker Oats contends that the district court erred as a matter of law in finding that Westfal Larsen, the defendant carrier, had successfully rebutted the shipper Quaker Oats' prima facie case, thus shifting the burden of proof back to Quaker Oats, without explaining the cause of the loss. Finding that the court did err in applying the COGSA burden-shifting scheme, we reverse.

Quaker Oats purchased approximately five hundred metric tons of tetrahydrofuran from Mitsubishi Corporation of Tokyo, Japan ("Mitsubishi"). Mitsubishi chartered the Torvanger to transport the tetrahydrofuran from Kobe, Japan to Houston, Texas. Analysis of a composite of samples of the tetrahydrofuran taken after the cargo had been loaded on the vessel in Kobe, Japan indicated that the peroxide content was well within commercially acceptable levels. Samples taken upon the Torvanger's arrival in Houston from the three tanks aboard the vessel in which the chemical was carried, however, revealed peroxide contamination in one of the tanks beyond com-

mercially acceptable levels. Quaker Oats sued the Torvanger and Westfal Larsen, asserting rights under COGSA for recovery of expenses incurred in purging the peroxide from the tetrahydrofuran.

I.

[1] Both parties agree that this dispute is governed by COGSA, which regulates the rights and liabilities arising out of the carrier's issuance of a bill of lading with respect to cargo damage or loss.[1] "To enforce their respective rights under the Act, litigants must engage in the ping-pong game of burden shifting mandated by Sections 3 and 4. [46 U.S.C. §§ 1303 and 1304]." *Nitram, Inc. v. Cretan Life,* 599 F.2d 1359, 1373 (5th Cir. 1979). The plaintiff establishes a prima facie case by proving that the cargo for which the bill of lading issued was "loaded in an undamaged condition, and discharged in a contaminated condition." *Socony Mobil Oil Company v. Texas Coastal and International, Inc.,* 559 F.2d 1008, 1010 (5th Cir. 1977). The "bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described." 46 U.S.C. § 1303(4).

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1. The carrier's responsibilities and liabilities under the Act are as follows:

Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

46 U.S.C. § 1303(1)-(2).

[2] Once the plaintiff has presented a prima facie case, "the carrier then has the burden of proving that it exercised due diligence to prevent the damage or that the harm was occasioned by one of the excepted causes delineated in 46 U.S.C. § 1304(2)."[2] *Blasser Brothers, Inc.*

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2. The excepted causes are listed in the Act as follows:

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the manager of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(*l*) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(*o*) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

46 U.S.C. § 1304(2). In exculpating the carrier, the district court relied on (q), providing in effect that the carrier may escape liability by proving that the damage occurred "without the fault" of the carrier.

v. Northern Pan-American Line, 628 F.2d 376, 381 (5th Cir. 1980); *accord Nitram, Inc. v. Cretan Life, supra,* 599 F.2d at 1373; *Socony Mobil Oil Company, supra,* 559 F.2d at 1010; *Nichimen Company, Inc. v. M/V Farland,* 462 F.2d 319, 325 (2nd Cir. 1972). *See also* 2A Benedict on Admiralty § 56 (7th ed. 1983).

[3] If the carrier rebuts the plaintiff's prima facie case with proof of an excepted cause listed in § 4(2)(a)-(p) of COGSA, 46 U.S.C. § 1304(2)(a)-(p), the burden returns to the plaintiff to establish that the carrier's negligence contributed to the damage or loss. *Blasser Brothers, Inc. v. Northern Pan-American Line, supra,* 628 F.2d at 382; *Cf. Lekas & Drivas, Inc. v. Goulandris,* 306 F.2d 426, 432 (2nd Cir. 1962). If the plaintiff is then able to establish that the carrier's negligence was a contributory cause of the damage, the burden shifts to the carrier "to segregate the portion of the damage due to the excepted cause from that portion resulting from [the carrier's] own negligence." *Nitram, Inc. v. Cretan Life, supra,* 599 F.2d at 1373.

[4] In addition to rebuttal of the prima facie case by proof of one of the specific exception causes of cargo damage, 46 U.S.C. § 1304(2)(a)-(p), the carrier may also rebut the prima facie case by relying on the catch-all exception in § 1304(2)(q) of COGSA, which provides that the carrier may exonerate himself from loss from any cause other than those listed in 4(2)(a)-(p) by proving that the loss or damage occurred "without the actual fault and privity of the carrier. . . ." 46 U.S.C. § 1304(2)(q). The carrier's burden of establishing "his own freedom from contributing fault . . . is no mere burden of going forward with evidence, but a real burden of persuasion, with the attendant risk of nonpersuasion." Gilmore and

Black, The Law of Admiralty § 3-37 at p. 168; § 3-43 (2nd ed. 1975). Consequently, the burden of proof does not return to the plaintiff, but rather judgment must hinge upon the adequacy of the carrier's proof that he was free from any fault whatsoever contributing to the damage of the goods entrusted to his carriage. *Id.*

II.

The district court in this case found that Quaker Oats had established a prima facie case by producing evidence that the tetrahydrofuran was "within purchase order specifications" upon delivery to the Torvanger and that "at least a portion of it was no longer in that condition when tendered to [Quaker Oats]" after shipment.

In rebuttal to that prima facie case, the carrier Westfal Larsen produced evidence by which peroxide formation could allegedly be considered an "inherent vice" of tetrahydrofuran, 46 U.S.C. § 1304(2)(m), and that due diligence was exercised by Westfal Larsen to avoid any other possible causes of peroxide formation. Though finding the evidence on the "inherent vice" exception to be "non-dispositive,"[3] the district court found that Westfal Larsen successfully rebutted Quaker Oats prima facie case by producing evidence of due diligence "with respect to the

3. The "inherent defect" exception to a carrier's COGSA liability, § 1304(2)(m) was not proved by the testimony that the chemical has a natural tendency to form peroxides when exposed to oxygen. Here, the uncontradicted testimony was that the chemical was properly treated by an inhibitor and protected from oxygenization by a nitrogen blanket during shipment and, thus, should not have formed peroxides. In order to establish this exception to COGSA liability, the carrier must show (as it did not here) some defect, quality, or vice adhering to the individual cargo of the chemical in question. *Horn v. Cia de Navegacion Fruco, S.A.*, 404 F.2d 422, 435 (5th Cir. 1969).

preparation of the loading and storage equipment, the loading of the cargo, and the care of the cargo during voyage . . . ," thus, "return[ing] to Quaker Oats the burden to show that the peroxide formation was caused at least in part by [Westfal Larsen's] negligence." Finding that the shipper Quaker Oats failed to carry the burden, the district court rendered judgment for Westfal Larsen, the defendant carrier.

III.

Before explaining the error in the district court's application of the COGSA burden-shifting scheme, the nature of the chemical shipped and the reasons for its peroxide contamination should be noted.

Tetrahydrofuran ("the chemical") has a natural tendency to form peroxides, especially if exposed to oxygen, unless it is chemically inhibited. Here, before shipment, the seller had treated the chemical with an inhibitor, and in fact the two tanks fully filled with the shipped chemical arrived without contamination; only the third tank, partially filled, was found to be peroxide-contaminated upon arrival. As a further safeguard against exposure to oxygen, all tanks were injected with a "nitrogen blanket" of sufficient pressure, designed to insulate the chemical from oxygen during shipment. The vessel's officers inspected the "nitrogen blanket" periodically and with due diligence, the district court found, and a water content analysis performed upon the cargo's arrival in Texas indicated that the nitrogen blanket had been properly maintained.

We thus have the following situation: If we accept the testimony offered for the shipper Quaker Oats (as the

district court did), the chemical was loaded and found after testing to be free of peroxide contamination when shipped and when the bill of lading was issued. If we accept the testimony offered for the defendant carrier, as the district court equally did, the vessel's officers performed with due diligence their duty of maintaining the protective nitrogen cover that should have made exposure to oxygen and peroxide contamination impossible during the period that the cargo was entrusted to the care of the shipper. Consequently, if all the evidence is true, the evidence shows no cause for the peroxide contamination. However, that contamination must have resulted either from some defect in the chemical or its processing for shipment, for which the carrier would not be responsible —which the evidence does not prove; or else that contamination must have resulted during shipment from some failure of the vessel's officers or of the vessel—which again is not proved.

IV.

[5] The district court held that the carrier's proof of due diligence in preparation of the cargo, its loading, and its care during the voyage "was sufficient to return to the Plaintiff the burden to show that the peroxide formation was caused at least in part by the Defendant's negligence."[4] None of the specific excepting causes (including

4. The district court then held that the plaintiff shipper had not negated the possibility that some ingredient in the chemical, not evident at time of testing when the cargo was loaded, had during the voyage overriden the inhibitor.

We pretermit that some doubt may be cast upon this deduction because the chemical to which the inhibitor had been added at the plant was from its homogenized bulk loaded into three tanks on the vessel two of which were completely filled (in which no contamination took place), and one of which only partially filled (in

the "inherent defect" exception, *see* note 3 *supra*), 46 U.S.C. § 1304(2)(a)-(p), were proved by the carrier, so the burden did not shift back to the shipper to prove that carrier negligence contributed to the damage. Under COGSA, the carrier's proof of the remaining general catch-all exception to liability relied upon, § 1304(2)(q), is not shown by its simple and to be expected evidence that its crew did all it was supposed to do (although here, however, somewhat corroborated as to the nitrogen blanket by testing on arrival). The statute provides, more stringently, that the carrier shall prove that its fault did *not* contribute to the accident: "the burden of proof shall be on the person claiming the exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." 46 U.S.C. § 1304 (2)(q).

For purposes of this catch-all no-fault exception to liability, 46 U.S.C. § 1304(2)(q), the presumption of fault—resulting from the arrival of cargo, damage free when shipped under bill of lading, but contaminated on arrival—is thus not rebutted by simple proof of the carrier's own due diligence, evidence peculiarily within its knowledge and control during the period of the shipment of the cargo entrusted to its care. For the § 1304 (2)(q) exception (*see* note 2, *supra*) to come into play, the carrier must first prove what that "other cause" was. *See*, W. Tetley, Marine Cargo Claims 245, 246 (1978). But the district court found that "no one knows what

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which the contamination took place), all three injected with a nitrogen blanket properly maintained as to pressure and checked periodically by the vessel's officers during the voyage. It is sufficient to note only that, as a matter of law, the plaintiff shipper did not bear the burden of *negating* pre-shipment contamination.

caused the cargo to form peroxide in the way it did" (R. 14) and indeed concluded that the cause of the damage was a "mystery" (R. 12).

To rebut the presumption of fault when relying upon its own reasonable care, the carrier must further prove that the damage was caused by something other than its own negligence. *Calmaquip Engineering West Hemisphere Corporation v. West Coast Carriers Ltd.*, 650 F.2d 633, 640-41 (5th Cir. 1981); *Socony Mobil Oil Company, supra,* 559 F.2d at 1013. Once the shipper establishes a prima facie case, under "the policy of the law" the carrier must "explain what took place or suffer the consequences." *Companie De Navigation, etc. v. Mondial United Corporation,* 316 F.2d 163, 170 (5th Cir. 1963); *see also* discussion of issue similar to the present in *Socony Mobil Oil Company, supra,* 559 F.2d at 111. "[T]he law casts upon [the carrier] the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability." *The Vallescura,* 293 U.S. 296, 303, 55 S.Ct. 194, 196, 79 L.Ed. 373 (1934).[5]

Here, contrary to the policy of the statute, the trial court placed the burden upon the shipper, not the carrier, to explain the unexplained or unexplainable loss. Its judgment must therefore be reversed, and the case re-

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5. As stated in Gilmore and Black, The Law of Admiralty, § 3-43, p. 185, the carrier

> has sooner or later the burden of establishing his own freedom from fault except where he has shown that the loss was caused by overwhelming force of third persons, some fault in the shipper or the goods, or the attempt to save life or property. This leaves with him the burden of explaining a loss and exonerating himself from the imputation of fault in almost all cases in which it has not been demonstrated that at least a part of the fault lies with somebody else.

manded for entry of judgment awarding the plaintiff the damages sustained.

Conclusion

For the reasons stated, the judgment dismissing the plaintiff's claim is REVERSED, and the case REMANDED for the award of damages.

REVERSED AND REMANDED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2314

THE QUAKER OATS COMPANY,
Plaintiff-Appellant,

versus

M/V TORVANGER, her engines, tackle, etc.,
and WESTFAL LARSEN and CO., A/S,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion 6/15/84, 5 Cir., 198__, ____F.2d____)

(July 13, 1984)

Before BROWN, TATE and HIGGINBOTHAM, Circuit Judges

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service of the

Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

/s/ ALBERT TATE, JR.
United States Circuit Judge

APPENDIX E

CARRIAGE OF GOODS BY SEA

46 USCS § 1304 SHIPPING

§ 1304. *Rights and immunities of carrier and ship*

(1) *Unseaworthiness.* Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool[ing] chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3 [46 USCS § 1303(1)]. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) *Uncontrollable causes of loss.* Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(*l*) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(*o*) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) *Freedom from negligence.* The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) *Deviations.* Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) *Amount of liability; valuation of cargo.* Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) *Inflammable, explosive or dangerous cargo.* Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

(Apr. 16, 1936, ch 229, Title I, § 4, 49 Stat. 1210.)